carrier's actions in determining whether to exercise its Title I jurisdiction.[63] For example, although the Commission decided not to regulate billing and collection practices pursuant to its Title I jurisdiction because there was sufficient competition to allow market forces to respond to excessive rates in billing and collection on the part of exchange carriers,[64] the Commission did decide to regulate a particular feature of billing and collection that was not offered competitively by other providers of billing services.[65] Thus, the Commission has determined that a lack of competition as to a particular non-basic service, component, or function can create the basis for the Commission to exercise its Title I jurisdiction to ensure that the public interest is served.[66]

In order for VIPs to offer service over Bell Atlantic's digital video dialtone network in Dover Township, end-users must obtain digital converter units from the VIP from which

---

[63] See, e.g., Detariffing Order, 102 F.C.C. 2d at 1169-71, 1174; Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, 7 FCC Rcd. 4028, 4030-31 (1992) (permitting bundling of cellular service and CPE in recognition that the CPE market was increasingly competitive and that there was relatively little chance that the bundling of CPE would affect cellular service prices); The Public Service Commission of Maryland and Maryland People's Counsel Applications for Review of a Memorandum Opinion and Order By The Chief, Common Carrier Bureau, Denying The Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services, Memorandum Opinion and Order, 4 FCC Rcd 4000, 4005 (1989) (Title I regulation merited when services not available from other providers, thereby having "bottleneck" attributes) ("Maryland Order"); Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order And Request For Supplemental Comment, 7 FCC Rcd 3528, 3532 (1992) (competitive pressures are the defining characteristic in determining whether to regulate a service under Title I).

[64] Detariffing Order, 102 F.C.C. 2d at 1170.

[65] Id. at 1174.

[66] See, e.g., Id.

they secure service. Bell Atlantic has consistently informed Rainbow that there is presently only one type of converter compatible with the Dover system.[67] This converter is produced by only one manufacturer, Philips Consumer Electronics Co. ("Philips"), which has developed and manufactured the units in accordance with Bell Atlantic's precise specifications.[68] In the course of exploring the most advantageous manner of ensuring that its end-user customers have the required converter units, Rainbow has been informed that it can either: (1) purchase the set-top box from Phillips for $1075 per converter, or (2) lease the digital converters for $6.00 per-unit per-month per-subscriber.[69] In order to offer service to consumers, Rainbow must either pass these costs along to its customers or absorb them itself. Notably, the cost of these converters is roughly double the cost of comparable digital converters now being deployed by the cable industry and well over three times the cost of other generally utilized converters on operating cable systems.[70]

---

[67] DeJoy Affidavit at ¶¶ 7-8, 10.

[68] Id. at ¶ 12, Attachment.

[69] Id. at ¶¶ 11-16. Significantly, even the price Rainbow is to be charged has been subject to significant uncertainty. Thus, initially Rainbow was told that the $6.00 lease rate per converter consisted of $4.50 attributable to the rent of the unit and $1.50 attributable to Bell Atlantic's maintenance fee. See id. at ¶ 14. Rainbow was also informed that it was not certain that Rainbow had the option of performing its own maintenance. Id. at ¶ 14. Thereafter, Rainbow was told that if it desired to perform its own maintenance, the cost of the converters would be more than doubled to $15.00 per unit. Id. at ¶ 15. Ultimately, Rainbow was told that Rainbow could perform its own maintenance but would still be required to pay the full $6.00 per unit, as if Bell Atlantic were in fact providing the maintenance service. Id. at ¶ 16. That Rainbow has had such serious difficulty in establishing the parameters of the necessary converter acquisition underscores the need for Commission regulation.

[70] Id. at ¶ 18.

While Rainbow is prepared to offer service and bear the requisite cost of so doing, it cannot compete effectively if its immediate competitors -- other VIPs on the platform -- receive preferential treatment in securing these critical converter units and there is not a competitive market that would allow Rainbow to secure this equipment elsewhere. The evidence reveals that FutureVision is indeed securing the converter units at a different price than is available to Rainbow.[71] In fact, FutureVision itself has stated that it will offer up to four set-top converter units per-customer for free with its $19.95 per month service.[72] Again, considering that FutureVision's tariffed costs are approximately $14.40 per month,[73] it is clear that FutureVision is paying significantly less than the rate Rainbow must pay for the necessary converter units and is likely paying only a nominal sum, if anything. If FutureVision can offer up to four digital converters to customers for free when Rainbow must bear costs of at least $6 per-month, per-converter, FutureVision will almost certainly enjoy a significant -- albeit unfair -- competitive advantage over Rainbow.

The apparent discriminatory arrangement between Bell Atlantic and FutureVision for the provision of digital converters thus poses a genuine and serious threat to the viability of video dialtone and fair competition. By forcing VIPs to obtain digital converters from either it or its designated manufacturer, Bell Atlantic has in effect created a bottleneck for the provision of this element of its video dialtone service.[74] And, because there does not exist

[71] Id. at ¶ 17.

[72] Id. at ¶ 24.

[73] See supra at Section 1.A.

[74] Services with bottleneck characteristics merit regulation under Title I. See Maryland Order, 4 FCC Rcd at 4005.

at this time sufficient competition to allow market forces to respond to excessive rates for digital converters, the threat of lasting and irreparable injury to the FCC's video dialtone goals is real and immediate. As the Commission found in Computer II, the Commission is justified in relying upon market forces only when the forces of competition are genuinely operating to affect the availability and price of services and equipment in the marketplace.[75] Just as the Commission correctly noted in previous instances, such as the recording aspect of billing and collection, the lack of competition as to the provision of a critical function properly forms the basis for the exercise by the Commission of its ancillary Title I jurisdiction.[76]

Because the evidence clearly illustrates that there is no competitive market for these key components, Commission intervention is overwhelmingly justified and necessary. By mandating that this critical component be offered on a nondiscriminatory basis until such time as it is competitively available, the Commission will further its core duty to promote a "rapid, efficient, Nation-wide and world-wide wire and radio communication service...at reasonable charges."[77] Otherwise, if Bell Atlantic is permitted to discriminate in favor of certain VIPs in the provision of the required digital converters, the resulting competitive imbalance could prove fatal to VIPs like Rainbow.

---

[75] Computer II, 77 FCC Rcd at 441.

[76] Detariffing Order, 102 F.C.C. 2d at 1174.

[77] 47 U.S.C. § 151.

II. BELL ATLANTIC HAS NOT DEMONSTRATED THAT THE TERMS OF THE TARIFF ARE REASONABLE AND NONDISCRIMINATORY

The often quoted rules governing the burden of proof in tariff investigations are straightforward.[78] Section 204(a) provides that, at any hearing involving a new or revised charge, the carrier has the burden of demonstrating that the new or revised charge is just and reasonable.[79] The Commission has long held that, in a hearing, Section 204(a) does not limit the carriers' burden to rates, but requires that carriers bear the burden of proof on other issues of lawfulness as well.[80] Pursuant to Section 204(a), the Commission designated a number of Bell Atlantic's tariff provisions for investigation and required Bell Atlantic to make the necessary showing that the tariff rates are just and reasonable, that the tariff terms and conditions are not unduly discriminatory, and that it did not otherwise violate any statute, agency regulation or Commission order.[81]

Bell Atlantic's Direct Case, however, fails to make this required showing. First, the tariff contains terms and conditions that, taken individually, have been structured so as to enable Bell Atlantic to discriminate in favor of selected programmers, such as FutureVision

---

[78] See supra nn.79-82.

[79] See 47 U.S.C. § 204(a); see In the Matter of Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 10, Rates, Terms, and Conditions, Transmittal 741, 786, DA95-1285 at ¶¶ 3,4 (rel. June 9, 1995) ("Suspension Order"). See also In the Matter of Beehive Telephone, Inc. v. The Bell Operating Companies, FCC 95-358, 78 R.R. 2d 1376, 1382 n.66 (1995).

[80] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 3098 and n.984 (1989); In the Matter of AT&T and Western Union Private Line Rate Case, 34 FCC 217, 317 (1961); see also Referral of Chastain v. AT&T, 49 FCC 2d 749, 751 (1974), vacated on other grounds, 65 FCC 2d 25 (1977).

[81] Designation Order at ¶¶ 3, 67.

and its affiliated future programmer, Bell Atlantic Video Services Company ("BVS"). Moreover, it is not enough to examine Bell Atlantic's terms and conditions individually to gauge their reasonableness.[82] The Commission also should examine the general framework of the entire tariff to discern the true purpose behind Bell Atlantic's video dialtone platform.[83] And, when taken together, the five-year term discount,[84] early termination penalty,[85] limited liability,[86] and other provisions of Bell Atlantic's video dialtone tariff conspire to insure that the distribution of programming over video dialtone is sustainable only for affiliated and favored VIPs. If the Commission is committed to making video dialtone a viable business for independent VIPs, the Commission should reject the terms and conditions of the tariff discussed below.

A. The Term Discounts Unreasonably Discriminate in Favor of Affiliated and Preferred Programmers

Bell Atlantic's tariff requires that VIPs purchase video dialtone service on the basic platform for terms of either five years or one month (on a month-to-month basis).[87] Under the terms of the tariff, VIPs that purchase channels for a five-year service term may take

---

[82] See In the Matter of Access and Divestiture Related Tariffs, FCC Docket No. 83-1145, 54 R.R. 2d 1119, 1121 (1993).

[83] See In the Matter of the Western Union Telegraph Company, 67 FCC 2d 96, 104 (1977).

[84] Tariff, Section 3.2(A).

[85] Tariff, Section 3.2(D).

[86] Tariff, Section 2.3.

[87] Tariff, Section 3.2.(A).

advantage of significantly discounted rates.[88] For example, VIPs that purchase 24 channels for a five-year service term are given a 22 percent discount over VIPs taking the same amount of capacity on a monthly basis.[89] As the Commission noted, such discounts can be "unreasonable if they are used to discriminate unduly against certain programmers."[90] Thus, while independent VIPs theoretically have the "option" of taking either five-year or month-to-month service, the fact is that only affiliated or preferred VIPs can likely take advantage of the five-year service option. For independent VIPs such as Rainbow, a five-year term is an unreasonably long period to commit to a new and unproven transport service. Moreover, given the separate tariff provision which would hold VIPs 100 percent liable for early termination,[91] it would be contrary to prudent business conduct for an independent VIP to make a five-year commitment in such circumstances.

In contrast, affiliated and favored programmers have no genuine risk of suffering the real dollar penalties associated with early termination liability or with the risks of deploying an unproven service. An affiliated programmer such as BVS, as both payer and payee, would effectively be paying any applicable early termination penalty to itself. Moreover, favored VIPs also do not have the same downside risk as independent VIPs. This is

---

[88] Tariff, Section 6.

[89] Thus, VIPs taking 96 channels of capacity subject to a five-year commitment could enjoy a $3 per month/per subscriber advantage over programmers taking monthly service, all other circumstances being the same.

[90] Designation Order at ¶ 44.

[91] Tariff, Section 3.2(D)(1). See Section II.B. infra.

especially so for FutureVision, who has a ten-year agreement with Bell Atlantic[92] and enjoys a unique status as the supplier of the proprietary software on the Dover Township system.[93] Thus, while Bell Atlantic maintains that term discounts "are vital to allow video dialtone to become a truly competitive service,"[94] the opposite is true. In fact, the term discount component will likely benefit Bell Atlantic's affiliated and favored programmers and disadvantage other VIPs, thereby hindering robust competition.

Significantly, Bell Atlantic fails to offer any justification as to why term discounts could not be given for service periods of shorter durations than five years. Instead of providing any legitimate justification for this provision, Bell Atlantic instead summarily responded that it "evaluated the market and determined that the proposed tariff structure was appropriate at this time."[95] Because Bell Atlantic does not set forth any economic basis for the proposed five-year term discount and does not explain why it has failed to offer terms of shorter duration that very well might be more attractive to a wider group of programmers, the Commission should reject the term discount provision.

---

[92] See supra at Section I.A. In fact, it is extremely possible that this agreement affords FutureVision certain options with respect to its term commitment, such as an agreement whereby Bell Atlantic would absolve FutureVision of liability in exchange for exclusive license rights to the interface software. It is thus critical that the Commission examine fully this agreement.

[93] In addition, FutureVision entered into a five-year agreement with Bell Atlantic to license its distance-learning scheduling and administrative software for use in New Jersey schools. See K. Gibbons, "FutureVision Still Talking to Programmers and Advertisers," Multichannel News at 26 (Aug. 29, 1994).

[94] Direct Case at 91.

[95] Id. at 92.

B. Bell Atlantic's Early Termination Penalty is Excessive and Unreasonable

Bell Atlantic's tariff contains an early termination penalty which seeks to hold a VIP taking video dialtone service liable for all of the charges that it would have paid through the entirety of the service period.[96] While some early termination penalty might be reasonably designed to compensate Bell Atlantic for related economic consequences, Bell Atlantic's attempt to assess a penalty of one-hundred percent liability for early termination of a new and untested service such as video dialtone is excessive and unreasonable. In fact, rather than being designed to make Bell Atlantic whole when a VIP terminates service, the provision appears designed to discourage independent VIPs from taking five-year service commitments and to penalize those that do so.[97] Notably, Bell Atlantic has failed to demonstrate that its proposed method for assessing liability is based on the costs that it will incur due to a VIP's early termination of the video dialtone service.

Critically, while affiliated and favored VIPs may not be adversely affected by this early termination penalty, given the nominal transfer of the penalty monies from one pocket to another, or the nature and scope of the Bell Atlantic/VIP relationship, this penalty will have a profound adverse effect upon other VIPs. For example, a VIP that took only 24 channels of digital capacity under a five-year term and found itself dissatisfied with Bell Atlantic's service after the first three months, would be required to pay an early termination

---

[96] Tariff, Section 3.2(D). The early termination provision provides that a programmer-customer who has requested and terminated service is subject to a one-time payment consisting of the monthly rate per potential end-user subscriber location, multiplied by the number of potential end-user subscriber locations in the service area at the time of termination, multiplied by the number of months remaining in the service period.

[97] See Suspension Order at ¶ 67.

penalty of almost $2 million for that unused service.[98] For a VIP taking 192 channels, such as Rainbow, a five-year term commitment would require it to assume a $16 million risk for early termination. Where, as here, the deployment of this new service is extremely speculative, this provision is unreasonably discriminatory. Thus, while Bell Atlantic has provided examples of tariffs in which it has imposed an early termination liability of one-hundred percent, those tariffs are for established services such as DS3 and frame relay service.[99]

While Bell Atlantic claims that the penalty is necessary as compensation for the early termination of service agreements,[100] it offers no evidence that such is the case, other than bald assertions that it is so. Indeed, Bell Atlantic's entire response to the Commission's inquiry regarding this matter is that "the 100% liability provision accurately measures Bell Atlantic's opportunity costs for the canceled customer."[101] Unless Bell Atlantic can demonstrate in concrete terms the economic losses that it will suffer, the Commission should reject Bell Atlantic's early termination penalty as unreasonable and discriminatory.

---

[98] This early termination penalty is calculated as follows: 1 (number of 24-channel blocks reserved) x $0.90 (cost per home passed per channel block using the term discount rate) x 38,000 (total homes passed) x 57 (number of months remaining in term commitment) = $1,949,000. This calculation does not include other tariffed charges that would also be subject to Bell Atlantic's early termination penalty.

[99] See Direct Case 96-97. Moreover, in those instances, potential customers have the option of choosing a number of different service terms which are unavailable to video dialtone VIPs taking service under Bell Atlantic's tariff. Id. at 94-95.

[100] Id. at 94-95.

[101] Id. at 95.

Finally, Bell Atlantic fails to justify the unfair limitation on the ability of VIPs to mitigate damages.[102] Despite Bell Atlantic's declarations to the contrary, the tariff provision would afford Bell Atlantic the opportunity to enjoy double recovery under certain circumstances. Thus, although Bell Atlantic would assert that any substitute VIPs should be deemed to have purchased channels other than or "in addition to" those reserved by the terminating VIP, it is more likely that such substitute VIPs would prefer to lease channels already established by a terminating programmer. First, already established channels are likely to have more attractive channel positions and thus higher viewerships than those not yet reserved. Second, any assignment of established channels will also have the benefit of valuable consumer recognition. Third, VIPs who utilize an existing service channel may well be able to avoid certain fixed costs of commencing service on dark channels. Consequently, given that Bell Atlantic has failed to justify the reasonableness of its mitigation provision or to demonstrate why it would not result in double recovery by Bell Atlantic, the Commission should reject this provision.

C. Bell Atlantic's Threshold Level for Inadequate Carrier Service Is Unreasonably High

Under the tariff, a VIP may terminate service without triggering Bell Atlantic's early termination liability penalty only if the VIP suffers interruptions to more than five percent of its subscribers for more than one hour per day for more than 30 days in any 90 day period, or a continual outage of more than five days affecting more than five percent of the VIPs'

---

[102] Tariff Section 3.2(D). Under the tariff, the VIP may mitigate its early termination liability only if it, rather than Bell Atlantic or any third party, finds a replacement programmer within 90 days of cancelling service prior to the expiration of its contract with Bell Atlantic.

subscribers.[103] This threshold level for inadequate service is unreasonably high and, when combined with Bell Atlantic's early termination penalty, further magnifies the discriminatory and unfair impact of the Bell Atlantic tariff for independent VIPs.

The cornerstone of a successful video programming business is service. Inadequate carrier service gives programmers a reputation for unreliability that repels both viewers and advertisers, and consequently undermines the overall VIP/end-user relationship.[104] For VIPs faced with the task of attracting viewers unfamiliar with the video dialtone service, and in all likelihood already connected to other video service providers, service defects and interruptions of even short duration or low frequency will be highly damaging.

Notably, it is not difficult to imagine numerous scenarios which highlight the unreasonableness of this tariff provision. For example, if Rainbow had 10,000 subscribers over a three month period and all 10,000 suffered daily one-hour outages for one third of that subscription period, there would be no recourse against Bell Atlantic because the outages did not last more than one hour. While it cannot be disputed that such a record would cause substantial losses in both viewership and advertising revenues, Rainbow also would be

[103] Tariff, Section 3.2(D). In addition, the VIP must give Bell Atlantic written notice of its intent to terminate within 30 days of the outage. Although the tariff includes a "Termination of Service Clause" which requires programmer-customers to request termination "at least 14 days prior to the requested service termination date," Section 3.2(D), that provision should be inapplicable here. VIPs canceling because of Bell Atlantic's inadequate service should be entitled to terminate service immediately upon their written notification.

[104] See Designation Order at ¶ 59.

subject to Bell Atlantic's early termination penalty if it canceled service under such conditions.

Once again, however, Bell Atlantic's Direct Case does not address the Commission's concerns regarding the reasonableness of Bell Atlantic's threshold for inadequate service, but instead states, without more, that it "believes that the 5% threshold represents a reasonable point at which the programmer's business may be considered to have been significantly affected."[105] Accordingly, Bell Atlantic's threshold level for inadequate service should be rejected as Bell Atlantic has not demonstrated that the provision is reasonable and nondiscriminatory.

D. Bell Atlantic Has Failed to Meet its Burden to Demonstrate that Other Terms of the Tariff Are Reasonable and Non-Discriminatory

1. Late Payment Interest Rate Differences Between Access Service Customers and Video Dialtone Customers Are Unreasonable and Discriminatory

Under the tariff, programmers that do not make the required payments within thirty days are assessed interest at the rate of 0.937% per month,[106] which is an annual percentage rate, assuming monthly compounding, of roughly 11.84%.[107] By contrast, under Bell Atlantic's access tariff, the rate of interest on past due accounts in only 8.8% per

---

[105] Direct Case at 98.

[106] Tariff, Section 2.7; see also Designation Order at ¶ 53. Initially, Bell Atlantic attempted to charge VIPs with a late payment penalty of approximately 15%. See Tariff 1st Revised page 17, Section 2.7.

[107] See Tariff, Section 2.7. By incorrectly compounding its late payment interest penalty on an annual basis for purposes of its Direct Case, Bell Atlantic represents that it will charge video dialtone customers a late payment interest rate of 11.25 percent per year. Direct Case at 103.

year (.00024657 per day).[108] Given that Bell Atlantic has failed to offer any justification for imposing different late payment rates of interest on video dialtone service subscribers than are imposed on access service customers, the Commission should reject this provision.

Significantly, Bell Atlantic initially attempted to ignore its common carrier obligations of nondiscrimination by claiming that the competitive nature of video dialtone somehow entitled it to charge an excessive rate of interest for late payments made by video dialtone providers.[109] The Commission, however, correctly recognized Bell Atlantic's late payment provision as violative of its common carriage obligation, stating: "[b]ased on that type of analysis, Bell Atlantic would be able to charge different types of access service customers different interest rates,"[110] a practice prohibited by Section 202(a).[111] Now, instead of offering more, Bell Atlantic simply asserts, incantation-like, that each rate separately is reasonable.[112]

According to Bell Atlantic, the rate charged video dialtone customers is reasonable because it is equal to the cost of capital.[113] The rate charged access service customers is

---

[108] Id.; Bell Atlantic Tariff FCC No. 1, Section 2.4.1(B)(3)(b).

[109] See Suspension Order at ¶ 68 (Bell Atlantic thus stated that the late payment penalty of 0.937% per month is warranted because "video dialtone service is offered in a highly competitive marketplace with new transport customers.").

[110] See Id. at ¶ 71.

[111] 47 U.S.C. § 202(a).

[112] Direct Case at 103.

[113] Id. Given the fact that Bell Atlantic is likely to compound interest on either a daily or monthly basis, even this representation is untrue.

reasonable, Bell Atlantic then asserts, because it is below the cost of capital.[114] But again we ask, why the difference? Significantly, the discriminatory effects of this provision will only be felt by unaffiliated and non-favored programmers, as they will be required to expend actual dollars rather than just transfer money from one hand to the other, and do not have any separate agreements that may mitigate the discriminatory effect of the provision. Until Bell Atlantic meets its burden to explain why such a provision is reasonable, the Commission should not allow Bell Atlantic to charge video dialtone customers a higher late payment interest rate than it charges access service customers.

2. The Tariff Unreasonably Fails to Provide for Interest on Deposits Held By Bell Atlantic

Likewise, Bell Atlantic's failure to provide for the payment of interest on channel reservation deposits[115] is unreasonable, discriminates against unaffiliated and non-favored programmers, and once again, subverts the fundamental objectives of the video dialtone policy. As the Commission has remarked, the lack of a provision for such interest enables Bell Atlantic "effectively [to receive] interest free loans from its customers."[116] Indeed, given the considerable delays in implementing the video dialtone service, the deposit received by Bell Atlantic constitutes a windfall to the carrier who, having no obligation even to segregate these funds from its own, is free to do what it wants with programmer funds while keeping any return it earns.

---

[114] Id.

[115] Tariff, Section 2.10.

[116] Suspension Order at ¶ 72.

Moreover, the failure to provide for such interest is unreasonable because it has a discriminatory affect on unaffiliated and non-favored programmers. As with Bell Atlantic's termination liability provisions, affiliated and favored programmers who make channel reservation deposits with Bell Atlantic suffer no economic loss because they effectively pay themselves or have other business affiliations that can compensate for this financial arrangement. Unaffiliated programmers, on the other hand, incur substantial opportunity costs by allowing to lie idle funds that could have been invested elsewhere. Indeed, Bell Atlantic's discriminatory policy has allowed Bell Atlantic unfettered access and use of $345,600 of Rainbow's funds since April, 1995.

Incredibly, Bell Atlantic weakly claims that its self-titled "Channel Reservation Deposit" provision is really a misnomer.[117] In order to escape paying interest on these deposits, Bell Atlantic engages in post hoc rationalization, asking the Commission now to think of these Channel Reservation Deposits as "pre-payments."[118] Contrary to Bell Atlantic's claims, however, the fact that a deposit may be applied to a customer's account at a later date does not change the status of that deposit.[119] Indeed, common carrier tariffs

---

[117] Throughout this proceeding, with no objection from Bell Atlantic, these payments have consistently, and accurately, been both labelled and regarded as "deposits." See, e.g., In the Matter of the Bell Atlantic Telephone Companies Tariff F.C.C. No. 10: Channel Reservation Deposit, 10 FCC Rcd 5036 (1995) ("Channel Reservation Deposit Order"); Suspension Order at ¶ 72; Designation Order at ¶ 54.

[118] Direct Case at 104-106.

[119] See, e.g., In the Matter of Investigation of Access And Divestiture Related Tariffs; AT&T Communications; Tariff FCC No. 4, Switched Digital Service; Tariff FCC No. 5, Special Construction; Tariff FCC No. 7, SKYNET Satellite Service, CC Docket No. 83-1145, Phase II, Part 2; Transmittal No. 1, Adopted June 28, 1984; 1984 LEXIS 2062, at *18 (1994).

have contained language clearly defining "pre-payments" and "deposits" separately and provide customers with interest on customer "deposits."[120] Deposits, such as the Channel Reservation Deposit made by Rainbow to Bell Atlantic, constitute funds that otherwise would be earning returns for their owners.

Bell Atlantic also contends that the Commission "approved" the channel reservation deposit terms in its Channel Reservation Deposit Order and thus cannot now consider the failure to provide for interest on those deposits.[121] Yet, the Channel Reservation Order did not approve the lack of a provision for interest payments in the tariff. Indeed, it never considered the issue. Rather, in the Order the Commission concluded only that:

> the provisions of Transmittals Nos. 741 and 756 which take effect on March 13, 1995 are not patently unlawful so as to warrant rejection and the petitioners have not raised any issue that warrants suspension and investigation of Bell Atlantic's channel reservation deposit at this time.[122]

The Commission, moreover, always retains the authority to investigate tariff provisions to ensure they are non-discriminatory and reasonable.[123]

---

[120] Id.

[121] Direct Case at 104.

[122] Channel Reservation Deposit Order, 10 FCC Rcd at 5037. (Emphasis added.) Furthermore, even had that order considered the issue, nothing would now preclude the Commission from reconsidering it. See 47 U.S.C. § 205(a).

[123] 47 U.S.C. §§ 204, 205(a). See, e.g., In the Matter of US West Tariff FCC No. 1, et al., 9 FCC Rcd 294, 296 (1994).

3. The Tariff Fails to Provide Reasonable Outage Credit Provisions and Notification Requirements

Finally, under the tariff, VIPs are only entitled to credit allowances if the service interruption is for a period longer than four hours after notification of the problem by programmers to Bell Atlantic.[124] Thus, Bell Atlantic has no obligation to correct a service problem -- and the four hour outage period does not start to run -- until it receives notice of a problem from the VIP. The tariff would thus impose no duty to act on Bell Atlantic even if it has knowledge of an outage from any other source, including end-user customers or its own network monitoring systems.[125] Here too, Bell Atlantic offers no credible justification for why it should not be obligated to respond to a complaint regarding a service outage received from any source.

The notification and outage credit provisions in the Bell Atlantic tariff also create incentives for anticompetitive behavior and discriminatory treatment in cases, such as Dover Township, where the video dialtone platform provider also services affiliated or favored programmers. For example, under the existing notification provisions, Bell Atlantic, while aware of an outage, could choose to act only with respect to favored or affiliated programmers. Likewise, given that Bell Atlantic has four hours before incurring liability for any outage period, Bell Atlantic will have a greater incentive to cure service interruptions suffered by affiliated and favored programmers than by other programmers. Consequently,

[124] Tariff, Section 2.3.

[125] Indeed, Bell Atlantic should be obligated to respond to complaints from end users and to problems identified by its own system.

independent programmers could suffer the longest service outages, and, as a result, will also suffer the greatest damage to their end-user relationships.

Moreover, Bell Atlantic's outage credit provisions do not provide adequate compensation to VIPs who do suffer outages. For example, under the existing tariff, Bell Atlantic could suffer a service outage that could disrupt an entire pay-per-view event without triggering any liability to programmer-customers. Consequently, credit allowances must be sufficient to compensate programmer-customers for resulting losses in revenue, and to enable them to repair the damage to the programmer/end-user relationship by providing refunds to customers. Moreover, reasonable credit allowances would create a greater incentive for Bell Atlantic to avoid such interruptions in the first place. The credits allowances present in Bell Atlantic's video dialtone service tariff, however, fail on all counts.

As with Bell Atlantic's unreasonable policy regarding interest on late payments, Bell Atlantic unjustifiably applies a different minimum defective service period to its video dialtone customers than it provides to its access service customers. While Bell Atlantic imposes a four-hour time period on video dialtone customers, it imposes an interruption period of only a fifteen-minutes on its access service customers.[126] Bell Atlantic has made no showing to justify this differential. Accordingly, this provision should be rejected.

CONCLUSION

Video dialtone was designed to promote fair video competition in the multichannel marketplace. As the Commission itself noted, through video dialtone, "video programmers

[126] Bell Atlantic Tariff FCC No. 1, Section 2.4.4(B)(1)(b).

will have guaranteed access on a nondiscriminatory basis to consumers . . . ."[127] An examination of the manner in which Bell Atlantic is deploying video dialtone service in Dover and of the tariff here under investigation, however, reveals that it is not being offered on a nondiscriminatory basis. Bell Atlantic apparently has a unique relationship with one VIP -- FutureVision -- that has affected its incentive and ability to act in an even-handed manner. The Commission should scrutinize this preferred relationship and take steps to ensure all essential video dialtone services are offered on a fair basis for all VIPs. Further, since Bell Atlantic has not met its burden to demonstrate the reasonableness of many tariff terms, they should be rejected. If the Commission fails to so act, it will imperil the ability of Rainbow to proceed.

Respectfully submitted,

Donna N. Lampert
James J. Valentino
Jennifer A. Purvis
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for
Rainbow Programming Holdings, Inc.

Dated: November 30, 1995

F1/46309.5

[127] Second Report and Order, 7 FCC Rcd at 5788.

APPENDIX 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Bell Atlantic Telephone Companies	)	**Transmittal Nos. 741, 786**
	)	
Revisions to Tariff FCC No. 10	)	**CC Docket No. 95-145**
	)	
Rates, Terms, and Regulations for Video Dialtone Service in Dover Township, New Jersey	)))	

AFFIDAVIT OF FRANK P. DeJOY IN SUPPORT OF OF OPPOSITION OF RAINBOW PROGRAMMING HOLDINGS, INC. TO BELL ATLANTIC'S DIRECT CASE

BEFORE ME, the undersigned authority, on this day personally appeared Frank P. DeJoy, who being by me duly sworn, states as follows:

INTRODUCTION

1. I, Frank P. DeJoy, am employed by Rainbow Programming Holdings, Inc. ("Rainbow") as Senior Vice President of Video Services. I have held this position since June, 1995. From 1981 to 1995, I held the position of Vice President and General Manager for Suburban Cablevision in New Jersey, formerly owned by Maclean Hunter, Inc.

2. As Senior Vice President, my responsibilities include the general involvement in Rainbow's video dialtone activities and overall responsibility for the provision of the video programming service in Dover Township, New Jersey. Specifically, regarding Dover Township, I have been responsible for negotiations with the Bell Atlantic Telephone Companies ("Bell Atlantic") regarding Rainbow's provision of service over the video dialtone platform and negotiations with equipment suppliers related to the provision of video dialtone

service. In addition, I also am responsible for financial, marketing, public relations, and budgetary matters regarding Rainbow's participation in Dover Township.

3. I am submitting this affidavit in support of the Opposition of Rainbow in the matter of the above-referenced Direct Case of Bell Atlantic.

4. In my position at Rainbow, I have knowledge of the manner in which Bell Atlantic has made available certain services essential to the provision of the video programming service utilizing the Dover Township platform.

5. In my capacity as Senior Vice President, I have learned that FutureVision of America Corporation ("FutureVision") currently has reserved 96 channels on Bell Atlantic's system in Dover Township.

6. I am personally aware that FutureVision has stated that it intends to offer 77 basic channels for $19.95 per subscriber/per month utilizing Bell Atlantic's video dialtone network in Dover Township.

7. During the course of several meetings and telephone conversations with representatives of both Bell Atlantic and Philips Consumer Electronics Co. ("Philips"), I have been repeatedly informed that Philips has been chosen by Bell Atlantic to be their sole supplier of digital set-top converter units for the video dialtone service in Dover Township. Although I have been advised by Bell Atlantic that Rainbow is free to select any other supplier for these converters, I have also been advised that there are no other digital set-top converters presently available that are capable of being used in Dover Township.

8. On July 27, 1995, I attended a meeting in Woodbury, New York with representatives of Bell Atlantic, including John Phillips, Manager, Carrier Services; Colton

O'Donoghue, Director, Broadband User Technical Interface; William Welch, Director, Network Operations, Broadband; and Greg Farmer, Manager, F.S.N. Terminals. The primary purpose of such meeting was to discuss the availability of digital converter units.

9. On Friday, September 1, 1995, I attended a meeting in Woodbury, New York, with representatives of Philips, including Brian Smith, Vice President, Market Development and Jeffrey Cox, Director, Digital Systems. The primary purpose of this meeting was also to discuss the availability of digital converter units.

10. During both the July 27, 1995 and September 1, 1995 meetings, I was told by both Bell Atlantic and Philips that there is presently available no other digital set-top converter capable of being used on the Dover Township platform.

11. In my capacity as Senior Vice President, I have concluded that Rainbow has the option of either purchasing the required digital set-top converter units from Philips directly or of leasing the units from Bell Atlantic Communications and Construction Services, Inc. ("BACCSI"), an affiliate of Bell Atlantic.

12. By letter of June 30, 1995, Alan Slater, a Philips Sales Manager, informed me that Rainbow could purchase 10,000 digital set-top converters from his company at a price of $1,075 per unit. A copy of the June 30, 1995 letter has been attached hereto.

13. During the meeting with Bell Atlantic on July 27 and in subsequent telephone discussions, John Phillips, Colton O'Donoghue, William Welch and Greg Farmer informed me that Rainbow can lease digital set-top converters for $6.00 per-unit per-month from BACCSI.

14. These Bell Atlantic representatives indicated to me during the July 27, 1995 meeting that $4.50 of the $6.00 rate is attributable to rent for the converter units and that the remaining $1.50 per-subscriber per-month constitutes a maintenance charge. At such time, I was informed that it was uncertain whether Rainbow would be permitted to perform any of its own maintenance on the digital set-top converters it provided to its end-users.

15. After further negotiation, Bell Atlantic representatives informed me that, in the event that Bell Atlantic did decide to permit Rainbow to perform its own maintenance, the leased rate for digital set-top converters would be increased to $15.00 per-unit per-month.

16. Thereafter, during an October 5, 1995 meeting with Bell Atlantic representatives in Woodbury, New York, John Phillips informed me that Rainbow would be charged $6.00 per-unit per-month, whether or not Rainbow chose to perform the maintenance function.

17. In a telephone conversation I had with John Phillips on October 19, 1995, I was informed that, pursuant to a 1992 agreement between FutureVision and Bell Atlantic, the digital converter unit lease rates applicable to FutureVision were specifically established. During that conversation, John Phillips also stated that Bell Atlantic was not charging FutureVision the $6.00 per unit rate offered to Rainbow, and did not deny that FutureVision was paying a reduced lease rate for these converters.

18. Based on my experience and information I have received regarding Cablevision Systems Corporation's ("Cablevision") current and planned use of digital services on its cable systems, I understand that comparable digital set-top converters generally are available for